

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1332

To be argued by
PIERCE O'DONNELL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1332

UNITED STATES OF AMERICA,
Cross-Appellant,
v.
JULIENNE BUSIC,
Cross-Appellee.



On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR CROSS-APPELLEE JULIENNE BUSIC

MICHAEL E. TIGAR
PIERCE O'DONNELL
1000 Hill Building
Washington, D. C. 20006
(202) 331-5000

Of Counsel:
WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006
(202) 331-5000

Attorneys for Cross-Appellee
Julienne Busic

TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	5
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. THE GOVERNMENT SHOULD BE PRECLUDED FROM CHALLENGING THE DISTRICT COURT'S DECISION TO GRANT EARLY PAROLE ELIGIBILITY TO JULIE BUSIC . . .	13
II. THE DISTRICT COURT CORRECTLY DETERMINED THAT IT HAD AUTHORITY TO GRANT EARLY PAROLE ELIGIBILITY TO JULIE BUSIC	18
A. Under The Plain Language And Legislative History Of 18 U.S.C. § 4205(b), Julie Busic's Life Sentence Did Not Preclude Her From Early Parole Eligibility	18
B. The District Court Correctly Ruled That, Since Section 7 of Pub. L. No. 85-752 Has Been Repealed, Early Parole Eligibility Is Available To Prisoners Serving Mandatory Sentences	23
C. Persons Convicted Under The Aircraft Piracy Statute May Be Granted Early Parole Eligibility	31
1. The Aircraft Piracy Statute Does Not Foreclose The Possibility Of Early Parole Consideration	31
2. The Aircraft Piracy Statute Does Not Impose A "Mandatory" Sentence Under Former Section 7	35

III.	THE GOVERNMENT HAS NO RIGHT TO APPEAL JULIE BUSIC'S SENTENCE AND THIS COURT SHOULD REFUSE TO EXERCISE ITS DISCRETIONARY JURISDICTION OVER THE MANDAMUS PETITION	39
A.	The Government Cannot Appeal A Disputed Sentence Under 28 U.S.C. § 1291	39
B.	This Is Not A Proper Case For This Court To Exercise Its Discretionary Mandamus Jurisdiction	43
	CONCLUSION	46

APPENDIX

A.	Relevant Federal Parole Provisions -- Prior to Passage of the Parole Commission and Reorganization Act of 1976
B.	Relevant Federal Parole Provisions -- After Passage of the Parole Commission and Reorganization Act of 1976
C.	Letter dated March 4, 1977, to Nancy Rosner, Esq., from Assistant United States Attorney Peter R. Schlam
D.	Letter dated July 20, 1977, to Honorable John R. Bartels from Edward R. Korman, Chief Assistant United States Attorney

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Abney v. United States</u> , 431 U.S. 651 (1977)	41
<u>Bankers Life & Casualty Co. v. Holland</u> , 346 U.S. 379 (1953)	45
<u>Carroll v. United States</u> , 354 U.S. 394 (1956)	39, 40, 41
<u>Duncan Townsite Co. v. Lane</u> , 245 U.S. 308 (1917)	44
<u>Duplan Corp. v. Deering Milliken, Inc.</u> , 397 F. Supp. 1146 (D.S.C. 1975)	16, 17
<u>Ex Parte Fahey</u> , 337 U.S. 258 (1947)	45
<u>Garafola v. Benson</u> , 505 F.2d 1212 (7th Cir. 1974)	22
<u>Gottesman v. General Motors Corp.</u> , 222 F. Supp. 342, 344 (S.D.N.Y. 1963)	16
<u>Grasso v. Norton</u> , 520 F.2d 27 (2d Cir. 1975)	22
<u>Kerr v. United States District Court</u> , 426 U.S. at 4 (1976)	43, 44, 45
<u>Jones v. United States</u> , 419 F.2d 593 (8th Cir. 1969)	29, 35, 37
<u>Marbury v. Madison</u> , 1 Cranch (5 U.S.) 137 (1803)	25
<u>McNabb v. United States</u> , 318 U.S. 332, 347 (1943)	17
<u>Muniz v. Hoffman</u> , 422 U.S. 454 (1975)	25, 26, 27, 28
<u>National Utility Service Inc. v. Whirlpool</u> , 325 F. 2d 779 (2d Cir. 1969)	15
<u>Rewis v. United States</u> , 401 U.S. 808 (1971)	30
<u>Roth v. McAllister Bros.</u> , 316 F.2d 143, 145 (2d Cir. 1963)	15
<u>Santobello v. New York</u> , 404 U.S. 257 (1971)	17

TABLE OF AUTHORITIES (cont'd)

<u>CASES:</u>	<u>Page</u>
<u>Scarano v. Central R. Co. of N.J.</u> , 203 F.2d 510 (3d Cir. 1953)	17
<u>Smith v. United States</u> , 360 U.S. 1 (1958)	30
<u>United States v. Alessi</u> , 536 F.2d 978 (2d Cir. 1953) . .	17
<u>United States v. Bass</u> , 404 U.S. 336 (1971)	30
<u>United States v. Carter</u> , 270 F.2d 521 (9th Cir. 19)	43
<u>United States v. Jackson</u> , 550 F.2d 830 (2d Cir. 1977)	40, 43
<u>United States v. Johnson</u> , 350 F. Supp. 807 (D. Mo. 1972)	35
<u>United States v. Jorn</u> , 400 U.S. 470 (1971)	40
<u>United States v. Lane</u> , 284 F.2d 937 (9th Cir. 1960)	42
<u>United States v. Kleinzhaler</u> , 306 F. Supp. 311 (E.D.N.Y. 1969)	36
<u>United States v. Martin Linen Supply Co.</u> , 430 U.S. 564 (1977)	39
<u>United States v. Olds</u> , 426 F.2d 562 (3d Cir. 1970) . . .	43, 44
<u>United States v. Ortiz</u> , 488 F.2d 1975 (9th Cir. 1973)	passim
<u>United States v. Remling</u> , 548 F.2d 1274 (6th Cir. 1977)	passim
<u>United States v. United States District Court</u> , <u>Cent. Dist. of Cal.</u> , 509 F.2d 1357, (9th Cir. 1977)	44
<u>United States v. Wilson</u> , 426 F.2d 562 (3d Cir. 1970) . .	39
<u>United States v. Woods</u> , 484 F.2d 427 (4th Cir. 1973) . .	36

TABLE OF AUTHORITIES (cont'd)

<u>CASES:</u>	<u>Page</u>
<u>Warden v. Marrero</u> , 417 U.S. 653 (1973)	28, 30, 42
<u>Will v. United States</u> , 389 U.S. 90 (1967)	44, 45
 <u>STATUTES:</u>	
1 U.S.C. § 109	20
18 U.S.C. § 4205	passim
18 U.S.C. § 4202	passim
18 U.S.C. § 4208	passim
18 U.S.C. § 3731	40, 41
18 U.S.C. § 3692	25
26 U.S.C. § 7237	29
28 U.S.C. § 1291	39, 40, 41, 42
49 U.S.C. § 1472	passim
Section 7 of Pub. L. 85-752, 72 Stat. 847 (1958)	passim
 <u>OTHER AUTHORITIES:</u>	
<u>Moore's Federal Practice</u> (2d ed. 1971)	16, 17
<u>Sutherland's Statutory Construction</u> (3d Ed. 1973) . . .	24
H. R. Rep. No. 958, 87th Cong., 1st Sess. (1961)	19, 27 33, 34
H. R. Rep. 885, 93d Cong. 2d Sess. (1974)	32
H. R. Rep. 93-1194, 93d Cong. 2d Sess. (1974)	32
Conference Report, H.R. Rep. No. 94-838, 94th Cong., 2d Sess (1976)	28

TABLE OF AUTHORITIES, (cont'd)

<u>STATUTES:</u>	<u>Page</u>
S. Rep. No. 2013, 85th Cong., 2d Sess. (1958)	21
S. Rep. No. 94-369, 94th Cong., 2d Sess. (1976)	28

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1332

UNITED STATES OF AMERICA,
Cross-Appellant,
v.
JULIENNE BUSIC,
Cross-Appellee.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR CROSS-APPELLEE JULIENNE BUSIC

ISSUES PRESENTED FOR REVIEW

1. Whether the government should be precluded from challenging the District Court's decision that it had authority to grant early parole eligibility to Julie Busic, despite her mandatory sentence, because as part of a plea agreement the government earlier recommended that early parole eligibility be granted to one of her co-defendants who also received a mandatory sentence.

2. Whether the District Court correctly determined that it had authority to grant early parole eligibility to Julie Busic.

3. Whether in view of the lack of statutory authority for the prosecutor's appeal of a disputed sentence and the absence of any extraordinary circumstances warranting the exercise of discretionary mandamus jurisdiction, this Court should entertain the government's attack on Julie Busic's sentence.

STATEMENT OF THE CASE

After a six-week trial, Julie Busic and Zvonko Busic were convicted of aircraft piracy resulting in death (Count I), aircraft piracy (Count II), and conspiracy to commit aircraft piracy (Count III). Two other co-defendants, Frane Pesut and Petar Matanic, were acquitted of Count I but convicted on Counts II and III.^{1/} The fifth co-defendant, Mark Vlasic, pleaded guilty to Count II before trial. The five were sentenced by the Honorable John R. Bartels in the United States District Court for the Eastern District of New York on July 20 and 21, 1977.

Under the federal aircraft piracy statute, each defendant was subject to mandatory imprisonment. 49 U.S.C.

^{1/} These four defendants have appealed their convictions. The government's cross-appeal of Julie Busic's sentence has been consolidated with the defendants' appeals.

§ 1472(i)(1).^{2/} Julie and Zvonko Busic were sentenced to life imprisonment on Count I. 49 U.S.C. § 1472(i)(1)(B). In addition, they received a concurrent sentence of five years imprisonment on Count III.^{3/} Pesut, Matanic and Vlasic were each subject to a mandatory minimum sentence of 20 years imprisonment. 49 U.S.C. § 1472(i)(1)(A). All three were sentenced to 30 years in prison.

All five defendants received a sentence which, by statute, automatically allowed consideration for parole after ten years. Pub. L. No. 94-233, 90 Stat. 219, 222 (1976), to be codified as 18 U.S.C. § 4205.^{4/} Pursuant to a plea bargaining agreement with the United States Attorney, Vlasic was made

^{2/} 49 U.S.C. § 1472(i)(1) provides:

"(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished --

"(A) by imprisonment for not less than 20 years; or

"(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life."

^{3/} No sentence was imposed on Count II because it was merged into Count I (Sentencing Transcript of July 20, 1977, at 15).

^{4/} Hereinafter this statute will be referred to as "18 U.S.C. § 4205". By virtue of subsection (a) of this provision, prisoners are ordinarily eligible for parole after having served one-third of their sentences or ten years of a life sentence. This section was formerly codified as 18 U.S.C. § 4202. The pertinent provisions of the old and new parole statute are set forth in Appendices A and B of this brief.

eligible for immediate parole under 18 U.S.C. § 4205(b)(2) (Sentencing Transcript of July 21, 1977, at 48).^{5/} Under the discretion granted him by 18 U.S.C. § 4205(b)(1),^{6/} Judge Bartels also ordered that Julie be eligible for early parole consideration but not until she had served eight years of her sentence. Thus, Julie was made eligible for parole only two years earlier than she would have been otherwise.^{7/}

Vlasic was subject to a mandatory sentence. The government promised to recommend -- and convinced the District Court to grant -- immediate parole eligibility. Nevertheless, the United States Attorney has done an about-face and now asks this Court to hold that, because Julie was subject to a mandatory sentence, she cannot be eligible for parole after having served eight instead of ten years in prison.

^{5/} Under 18 U.S.C. § 4205(b)(2), after fixing a maximum sentence the judge may specify that the prisoner be released on parole at any time that the Parole Commission may determine. The section was formerly codified as 18 U.S.C. § 4208(a)(2).

^{6/} Under 18 U.S.C. § 4205(b)(1), the judge may designate a minimum term at the expiration of which the defendant becomes eligible for parole. The section was formerly codified as 18 U.S.C. § 4208(a)(1).

^{7/} Of course, the sentence imposed by Judge Bartels provides only that Julie will be eligible for parole consideration after eight years' confinement. The trial court's sentence has no effect on when the Parole Commission in its discretion will release Julie.

STATEMENT OF FACTS

Judge Bartels ordered that Mark Vlasic be eligible for immediate parole because of "the Government's agreement that the Court exercise its discretion in favor of Marc Vlasic pursuant to Section 4205(b)(2) of Title 18 of the United States Code" (Sentencing Transcript of July 21, 1977, at 47). According to the written plea bargaining agreement, the government, in return for Vlasic's guilty plea to aircraft piracy under Count II, promised that it would "recommend . . . that the sentence be imposed pursuant to Title 18, U.S.C., Section 4205(b)(2)."^{8/} Aware that Vlasic was facing a mandatory sentence, the government, through Chief Assistant United States Attorney Edward R. Korman, informed Judge Bartels that "we will not challenge" the imposition of early parole eligibility.^{9/} At sentencing, Mr. Korman recommended that Vlasic be given immediate parole eligibility (Sentencing Transcript of July 21, 1977, at 44).

Despite profound misgivings that Vlasic should not be "treated any differently than Frane Pesut or Petar Matanic,"

^{8/} The agreement concerning the disposition of Vlasic's case was summarized in a letter of March 4, 1977 from Peter R. Schlam, Assistant United States Attorney, to Nancy Rosner, Vlasic's attorney. The letter is set forth as Appendix C of this brief.

^{9/} Letter of July 20, 1977 from Edward R. Korman, Chief Assistant United States Attorney, to the Honorable John R. Bartels. The letter is set forth as Appendix D of this brief.

Judge Bartels accepted the plea bargaining agreement because

"[t]he alternative of rejecting the agreement will be a potential trial of Marc Vlasic, which, of course, it is obvious would, under the present circumstances, be completely unreasonable and impracticable" (Id. at 47, 48).

Therefore, only because of the agreement engineered by the United States Attorney, Vlasic received early parole eligibility.

When Judge Bartels ordered that Julie be eligible for early parole consideration, the situation was entirely different. Not only had he listened to six weeks of testimony -- including impressive evidence about Julie's character and reputation and her own testimony -- he had also examined letters from dozens of persons who knew her and a comprehensive presentence memorandum prepared by her attorneys (see Appendix for Cross-Appeal at 56-67) (hereinafter "Cross App."). Before sentence was imposed, Judge Bartels also had the opportunity to consider Julie's lengthy statement to the Court (Sentencing Transcript of July 20, 1977, at 56-92). While he was quite conscious of the fact that Julie had been convicted of a "terrible crime,"^{10/} the Judge granted her early parole eligibility because he believed that her degree of culpability was limited.

At the time of sentencing, Judge Bartels was thoroughly familiar with Julie's background. He knew that she had always

^{10/} Sentencing Transcript of July 20, 1977, at 107.

been very close to her father, a professor of Classical Greek at Portland State University, and her mother, a librarian in a local public school (Cross App. at 58). The Judge was aware that, despite having attended college in the late 1960's, Julie was not a political activist (Id.). Rather, she was a serious, hard-working student who was much more concerned with her education than most of her contemporaries (Id.). That concern is demonstrated by the fact that she graduated with honors from both high school and college (Id.).

While a college student, Julie held a number of part-time and summer jobs to pay for her tuition and living expenses. While attending the University of Vienna in 1967, she also worked as a tutor-governess for an Austrian family (Id. at 59). In 1968 and 1969, Julie worked as a nurse's aide at the Belmont Convalescent Center in Portland, Oregon, the Seaside Convalescent Centre in Seaside, Oregon, and at a nursing home in Eugene, Oregon (Id.). Although she could have found jobs paying more money and offering better working conditions, she chose this type of work for the personal satisfaction she derived from helping people who desperately needed the attention and kindness she showed them (Id.).

Judge Bartels also knew that, after graduating from Portland State University in 1975, Julie and her husband moved to New York where she taught English to Spanish-speaking immigrants at the S.C.S. Business and Technical School (Id.). Her colleagues

at the school found Julie to be an unusually dedicated, concerned, and hard-working teacher (Id. at 60). She truly cared about her students as people and went out of her way to help them with problems outside of school such as finding suitable housing and employment (Id.).

Julie's counsel summarized for Judge Bartels interviews they had conducted with scores of Julie's friends and colleagues:

"Many of the other people we contacted who knew Mrs. Busic related instances where she had put others ahead of herself. All of the people we spoke to -- her friends and acquaintances, her parent's neighbors, her college professors, her former landlord in New York, and her former employers in Vienna, Portland and New York -- expressed utter amazement at her involvement in a hijacking. Again and again she was described as a sensitive, warm, compassionate and gentle person. None could conceive of her approving of violence in any form or for any cause" (Id. at 60).

Judge Bartels understood that Julie had no criminal history. He realized that she was not a Croatian nationalist and that her involvement in this incident was based on sheer fortuity -- she happened to be married to a dedicated Croatian patriot.^{11/} After the lengthy trial, the Judge recognized that Julie -- who has always claimed that she did not intend to participate in

^{11/} Judge Bartels was also aware that many of the facts surrounding Julie's involvement were hotly contested and in doubt. See Brief for Appellants Julianne Busic and Zvonko Busic at 13-18. The jury deliberated for two and one-half days (Id. at 5).

a hijacking and had not done so -- was not as morally culpable as the other defendants.^{12/}

"Now, this is particularly difficult for this Court to sentence Julianne Busic because it is obvious that she is a gentle, sympathetic young lady who if she had not met Zvonko Busic, would probably have never been engaged in any such transaction as participating in a hijacking

"Now, I have read all the letters . . . and I have a profile of her disposition and strong character and concern for other people. In fact, while the analogy is not complete, Zvonko Busic's influence over Julianne Busic was similar to that of the hypnotism that Zvengali exercised over Trilby O'Ferrall in George duMaurer's novel, Trilby.

* * *

"[O]ne of the recognized principles in reaching a sentence is to fit the penalty not only to the crime, but to the criminal. . . . [Julie] was so overwhelmed with love for and dedication to her husband that her common sense was affected and abrogated" (Sentencing Transcript of July 20, 1977, at 106, 110).

Judge Bartels recognized his "duty to consider and protect the rights of the passengers and the public generally" (Id.

^{12/} We are obliged to bring to the Court's attention another example of intemperate argument by the government. Abandoning reason and resorting to emotion, the United States Attorney, by citing an article from the New York Times, has attempted to portray Julie as a "terrorist". Brief for Cross-Appellant at 2 n.l. Judge Bartels flatly rejected any such notion: "I do not consider Zvonko Busic and his wife Julianne Busic as war criminals or terrorists. I think that it is necessary to preface the sentence with those remarks" (Sentencing Transcript of July 20, 1977, at 96-97).

at 107). He exercised his discretion carefully, making Julie eligible for parole only two years earlier than she would have been otherwise entitled. It is this sensitive, informed exercise of discretion that the government challenges in its cross-appeal.

SUMMARY OF ARGUMENT

Julie Busic was sentenced to a mandatory life imprisonment term for her conviction of aircraft piracy resulting in death. Judge John R. Bartels also made her eligible for parole consideration after eight years instead of the ten years she would have otherwise been required to serve under the federal parole laws. Although it was aware that Julie Busic's co-defendant, Mark Vlastic, was also subject to mandatory imprisonment for his conviction of aircraft piracy, the government nevertheless persuaded Judge Bartels to grant Vlastic immediate parole eligibility as part of a plea agreement. In this Court, however, the government has taken a diametrically opposite position. It attacks the District Court's decision to grant Julie Busic early parole eligibility after eight instead of ten years by arguing that the trial court lacked the authority to use this sentencing alternative because Julie Busic was subject to a mandatory sentence. Such unprincipled conduct by the representative of the United States cannot be tolerated. Under settled principles, the government, having established its legal position on

an issue as to one defendant, is not free to flip-flop and adopt a directly contrary position toward a similarly situated defendant in the very same case. The government should be precluded from challenging Julie Busic's sentence.

The government's argument on the merits is frivolous. In statute after statute, Congress has clearly expressed its view that parole is a vital and favored component of the criminal justice system. Parole allows an individualized sentencing approach to the defendant that is well suited to reconciling the often competing goals of the criminal process. Thus, Congress, by enacting 18 U.S.C. § 4205(b), permitted the judiciary to make worthy defendants eligible for parole consideration before the expiration of one-third of their sentence. With this provision, Congress sought to increase the availability of parole as a sentencing tool to promote rehabilitation and to reduce sentencing disparity.

By granting early parole eligibility to Julie Busic under 18 U.S.C. § 4205(b), Judge Bartels was implementing these important congressional policies. His authority to impose this sentence is evident from the plain language of the early parole provision. The government nonetheless argues that Section 7 of Pub. L. No. 85-752 (1958), which bars early parole eligibility to anyone given a "mandatory" sentence, was an obstacle to that decision. As the District Court properly held, however, Section 7 was repealed by the Parole Commission and Reorganization Act

of 1976. It has been replaced by 18 U.S.C. § 4205(h), which contains no restrictions on the availability of early parole.

Even if Section 7 had not been repealed, it would not have prevented Judge Bartels from granting Julie Basic early parole eligibility. Because of the strong congressional policy favoring parole, several courts had read Section 7 in a restrictive manner. Under the proper interpretation of Section 7's language, Julie is not serving a "mandatory" sentence and could therefore not be denied the benefits of the early parole provision.

The government's challenge of Julie Basic's sentence must fail because it cannot satisfy the threshold requirement of presenting a case properly within this Court's jurisdiction. Under well-established precedent, the government has no right to appeal a disputed sentence. If any relief is appropriate, the United States Attorney must proceed by mandamus. The extraordinary remedy of mandamus is reserved for truly extraordinary causes. In this case, however, the exercise of this Court's discretionary jurisdiction would be highly inappropriate. The District Court carefully considered a matter of first impression. The decision was not clearly erroneous and hardly represents a usurpation of power. Moreover, the mandamus remedy is governed by equitable considerations. By virtue of its duplicitous conduct, the government does not come to this Court with "clean hands".

The Government's request for relief should be denied and Julie Basic's sentence should not be disturbed.

ARGUMENT

I.

THE GOVERNMENT SHOULD BE PRECLUDED FROM
CHALLENGING THE DISTRICT COURT'S DECISION TO
GRANT EARLY PAROLE ELIGIBILITY TO JULIE BASIC

With respect to the early parole eligibility of a defendant convicted of aircraft piracy and subject to a mandatory prison term, the government has urged upon the trial and appellate courts inconsistent positions adopted to further its shifting interests. This conduct is blatantly duplicitous and belies the government's good faith in appealing Julie's sentence. Such calculated disrespect for the judicial process cannot be tolerated by this Court.

For obvious and legitimate reasons, the government wanted to strike a plea bargain with Mark Vlasic. The final agreement provided that Vlasic would plead guilty to Count II charging him with aircraft piracy. See Appendix C. The punishment for aircraft piracy is a mandatory minimum sentence of 20 years in prison. 49 U.S.C. § 1472(i)(1)(A). Pursuant to its bargain with Vlasic, the government convinced the District Court to grant him immediate eligibility for parole under 18 U.S.C. § 4205(b)(2). When Julie's attorneys asked that she be granted parole early eligibility under the same statute, the

government objected. Significantly, the United States Attorney claimed that the Judge had no power to grant the benefits of § 4205(b) to "a defendant who is convicted of an offense which carries a mandatory minimum sentence, particularly a mandatory life sentence . . ." (Cross App. at 44). Although all five defendants were subject to mandatory imprisonment, the government argued that the Judge should grant Vlasic early parole but had no power to do the same for Julie or any of the other three defendants.

The prosecutors were aware of this inconsistency. In pressing for acceptance of Vlasic's plea bargaining arrangement, they cavalierly told Judge Bartels that they would ignore the inconsistency if he would. See Appendix D. To his credit, the Judge did not allow himself to be used by the government in this unseemly fashion. Instead, Judge Bartels ruled that he had the legal authority to grant early parole eligibility to Vlasic's co-defendants. Having safely disposed of Vlasic's case, the government in this Court contends once again that Julie cannot be granted early parole eligibility because of her mandatory sentence.

In a transparent attempt to dispel any notion that it is taking an inconsistent position on the same issue in the same case, the government seeks to create a distinction between "mandatory life sentences" and mandatory sentences generally. Any such purported distinction is fanciful. First, Section 7 of Pub. Law No. 85-752, the provision which the government claims

disables Julie from receiving early parole eligibility, explicitly spoke only in terms of a "mandatory penalty." For two decades, no case law construed the statute in the same manner as the government's imaginative counsel.

Second, at sentencing the United States Attorney opposed early parole eligibility for not only Julie but also co-defendants Matanic and Pesut -- both of whom had been acquitted of Count I and both of whom were in the identical position as Vlastic because of their convictions on Count II and liability for a mandatory minimum sentence of 20 years imprisonment. The government's belated effort to save face by concocting this specious argument is unavailing. The simple fact of the matter is that the United States Attorney is asking this Court to close its eyes to the obvious and to condone this sorry spectacle of disingenuous advocacy.

This Court has taken the lead in preventing litigants from acting in the way that the government has acted here. It has held that a litigant cannot shift his position to support his shifting interests.

"A party having assumed a certain position in a legal proceeding and having succeeded in maintaining that position . . . may not thereafter assume a contrary position in a subsequent proceeding elsewhere simply because its interests have changed" Roth v. McAllister Bros., Inc., 316 F.2d 143, 145 (2d Cir. 1963); see also National Utility Service, Inc. v. Whirlpool Corp., 325 F.2d 779, 780 n.3 (2d Cir. 1963).

When a litigant seeks to shift his position to accommodate a shift in his perceived interests, the courts prevent such conduct by invoking the doctrine of preclusion against inconsistent positions or, as it is sometimes called, "judicial estoppel". See 1B Moore's Federal Practice ¶ 0.405[8] at 765 (2d ed. 1971). Unlike equitable estoppel, which protects an adversary who may be prejudiced by an attempted change in position, judicial estoppel "is designed to protect the integrity of the courts and the judicial process." Duplan Corporation v. Deering Milliken, Inc., 397 F. Supp. 1146, 1177 (D.S.C. 1975). As a device to safeguard both the courts and cherished notions of fair play,

"[t]he preclusion rule has been held to operate regardless of whether the prior inconsistent position was successfully maintained; and irrespective of reliance by, or prejudice to, the party invoking it. Strangers, as well as parties to the proceeding in which the prior inconsistent position was taken, may take advantage of the preclusion." Duplan Corporation v. Deering Milliken, Inc., supra, 397 F. Supp. at 1178, quoting 1B Moore's Federal Practice ¶ 0.405[8] at 767-68 (2d ed. 1971)(emphasis added); see also Gottesman v. General Motors Corp., 222 F. Supp. 342, 344 (S.D.N.Y. 1963).

The government's obviously inconsistent positions in this case demean the judicial process and make a mockery of equal justice.

"Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate. And this is more than affront to judicial dignity. For

intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." Scarano v. Central R. Co. of N.J., 203 F.2d 510, 512-13 (3d Cir. 1953) (citation omitted), quoted in Duplan Corp. v. Deering Milliken, Inc., *supra*, 222 F. Supp. at 1178, and 1B Moore's Federal Practice, *supra*, ¶ 0.405[8] at 767.

Such an attempted debasement of the judicial process is particularly egregious when perpetrated by the United States Attorney. Our commitment to due process and the even-handed administration of justice compels that the representative of the federal government proceed with absolute integrity and scrupulous fairness in all criminal proceedings. Just as this Court has a solemn duty to hold the government to high standards of fairness in the plea bargaining/sentencing process and to prevent it from unscrupulously altering its position, *see, e.g., Santobello v. New York*, 404 U.S. 257 (1971); United States v. Alessi, 536 F.2d 978 (2d Cir. 1976), it must condemn the "affront to judicial integrity" in this case.

"[A] decent regard for the duty of courts as agencies of justice and custodians of liberty"^{13/} therefore requires that the government be prevented from acting as ignobly as it did here. The government should be precluded from contesting the validity of Julie's sentence.

^{13/} McNabb v. United States, 318 U.S. 332, 347 (1943) (Frankfurter, J.)

II.

THE DISTRICT COURT CORRECTLY DETERMINED
THAT IT HAD AUTHORITY TO GRANT EARLY PAROLE
ELIGIBILITY TO JULIE BUSIC

- A. Under The Plain Language And Legislative History Of 18 U.S.C. § 4205(b), Julie Basic's Life Sentence Did Not Preclude Her From Early Parole Eligibility.

A federal prisoner is ordinarily eligible for parole after serving one-third of the sentence imposed or "after serving ten years of a life sentence." 18 U.S.C. § 4205(a). However, the District Judge is empowered to reduce the amount of time a defendant must serve before becoming eligible for parole by

"designat[ing] in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court" 18 U.S.C. § 4205(b)(1).

Judge Bartels acted under this provision in making Julie eligible for parole after eight years of imprisonment. With this carefully-fashioned sentence, the trial court gave effect both to the general community perception that punishment should be related to moral guilt and to the powerful policy considerations underlying congressional enactment of the early parole provision. The government, however, urges upon this Court a restrictive reading of the federal parole law. Such a wooden interpretation is

manifestly not justified by either the plain language of the statute or its legislative history.

The government first argues that under § 4205(b) the District Judge cannot grant early parole eligibility unless he has "discretion" to sentence the defendant to more than a year in prison. Brief for Cross-Appellant at 5. This argument is manufactured out of thin air. The statute neither explicitly nor implicitly restricts the judge's sentencing power in this manner. On the contrary, the statute requires only that, in order to impose early parole eligibility, "the court hav[e] jurisdiction to impose sentence" and the sentence imposed be longer than one year.^{14/} 18 U.S.C. § 4205(b). The government's interpretation is fatuous.

The government next argues that § 4205(b)(1) does not apply to life sentences because the statute provides that the term after which early parole can be granted "may be less than but shall not be more than one-third of the maximum sentence imposed." The government contends that since one-third of a life sentence cannot be calculated, § 4205(b)(1) could

^{14/} The government's argument flies in the face of not only the plain language of § 4205(b) but also the legislative history of the federal aircraft piracy statute. "The federal courts are also given discretion, in the case of sentences to imprisonment for more than 1 year, to specify a minimum term" H.R. Rep. No. 958, 87th Cong., 1st Sess. (1961) reprinted in 1961 U.S. Code, Cong. & Admin. News 2563, 2568 (emphasis added). See pages 31-33, infra.

nkt have been intended to encompass life sentences. Brief for Cross-Appellant at 5-6. What the government overlooks, however, is that § 4205(a), which explicitly grants parole eligibility to those serving life sentences, also calculates one-third of a life sentence to be ten years. When both subsections (a) and (b) of § 4205 are read together, the ten-year calculation of subsection (a) is clearly applicable to subsection (b).^{15/}

Subsection (b)(2), which is more lenient than subsection (b)(1), clearly applies to those serving life sentences. Among other reforms, the Parole Commission and Reorganization Act of 1976 reduced from 15 to ten years the amount of time a life prisoner must serve before becoming eligible for consideration under § 4205(a), the ordinary "one-third" parole eligibility provision.^{16/} This congressional attempt to minimize the harshness of life sentences dispels any notion that, at the same time and in the same legislation, Congress barred offenders with life sentences from the possibility of early parole consideration. The government's second contention is frivolous.

^{15/} In any case, this calculation is necessary only to insure that parole eligibility under subsection (b) is not delayed beyond the bounds set by subsection (a). The calculation is irrelevant where, as here, the defendant is made eligible for parole before the ten years in which she would have been otherwise eligible under subsection (a).

^{16/} Compare former 18 U.S.C. § 4202 with 18 U.S.C. § 4205(a).

The government's draconian interpretation of § 4205 flies in the face of the strong congressional commitment to the availability of early parole eligibility as a sentencing alternative. Until 1958, a federal prisoner became eligible for parole only after serving one-third of the sentence imposed, or 15 years of a life sentence. See former 18 U.S.C. § 4202. In that year, however, Congress acted to allow federal judges to grant early parole eligibility by making precisely the kind of individualized determination that Judge Bartels made in Julie's case. Congress passed Public Law No. 85-752, 72 Stat. 845, which was then codified as 18 U.S.C. § 4208. In conferring this authority, Congress sought to promote significant correctional policies.

"This section provides the chief means by which the judiciary and the executive branch can coordinate efforts to protect the public by formulating sentences which carry out more fully the purposes of deterrence, incapacitation, and reformation.

"The purpose of this section is to provide the court with optional procedures which will enable it to impose sentences which may be indeterminate in nature. This would permit the court, at its discretion, to share with the executive branch the responsibility for determining how long a prisoner should actually serve." S. Rep. No. 2013, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S. Code, Cong. & Admin. News 3891, 3892 (emphasis added).

This Court has recognized the critical importance of not restricting the sentencing judge's flexibility in allowing the parole authorities to adjust the prisoner's sentence to his

rehabilitative progress.

"A major purpose of any indeterminate sentence provision is to give the Parole Board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community. By keeping the minimum low, the prisoner is encouraged to earn favorable consideration for parole in accord with the public policy embodied in the parole statutes.' National Council on Crime and Delinquency, Guides for Sentencing 21 (1963). An additional purpose of indeterminate sentencing is to provide a mechanism for reducing disparity of sentences given by different judges. Grasso v. Norton, 520 F.2d 27, 32 (2d Cir. 1975), quoting Garafola v. Benson, 505 F.2d 1212, 1217 (7th Cir. 1974) (emphasis added).

As this Court has also acknowledged, Congress appreciated the importance of parole in the criminal justice system and decided that parole eligibility decisions should be made by the courts on an individualized basis.

"It is of particular note . . . that Congressman Emanuel Celler, the Chairman of the House Judiciary Committee and author of the bill, recognized that Section 4202 created "a purely arbitrary limitation which does not take into consideration the varying responses which individual prisoners made to the rehabilitation program . . ." Grasso v. Norton, supra, 520 F.2d at 32 (emphasis added).

Thus, federal judges have been given wide discretion and encouragement to tailor parole eligibility to the particular defendant. The legislative history of the early parole eligibility statute convincingly refutes the government's suggestion that a special punitive exception was carved out for defendants with mandatory

sentences. Indeed, with their long sentences, these defendants must be considered among the primary intended beneficiaries of this remedial legislation.

The early parole provision is on its face directly applicable to Julie Busic. In making her eligible for parole consideration after eight years, Judge Bartels effectuated congressional policy favoring parole and individualized parole eligibility decisions. The government's constricted reading of this statute must be rejected.

B. The District Court Correctly Ruled That, Since Section 7 of Pub. L. No. 85-752 Has Been Repealed, Early Parole Eligibility Is Available To Prisoners Serving Mandatory Sentences

The government also argues that Section 7 of Pub. L. No. 85-752, 72 Stat. 845, 847 (1958), prohibits early parole eligibility for anyone subject to a mandatory sentence. Cross-Appellant's Brief at 6-10. Since the District Court was required to sentence Julie to life imprisonment under 49 U.S.C. § 1472(i)(1), the government argues, she is ineligible for early parole. As Judge Bartels correctly ruled, however, Section 7 has been repealed. Cross App. at 15-17.

In 1958, Congress passed Pub. L. No. 85-752 to amend Chapter 311 (Parole) of Title 18 to allow early parole eligibility. Section 7 of that enactment, which was never codified, provided that "this Act does not apply to any offense for which there is provided a mandatory penalty." However, Congress recently

passed the Parole Commission and Reorganization Act of 1976^{17/} and explicitly repealed Chapter 311 in its entirety. Section 2 of this Act provides:

"Title 18 of the United States Code is amended by repealing chapter 311 (relating to parole) and inserting in lieu thereof the following new chapter to read as follows:" Pub. L. No. 94-233, 90 Stat. 219.

Nowhere in new Chapter 311 did Congress incorporate the prohibition contained in Section 7 of former Chapter 311 or any similar language disqualifying certain classes of offenders from the early parole eligibility provisions. Thus, Congress has repealed Section 7.^{18/}

In the face of the incontrovertible fact that Congress did not reenact Section 7, the government is reduced to arguing that, although Section 7 no longer exists in Chapter 311, this Court, by some judicial legislation, should nevertheless read the repealed provision back into the new parole law. This position is flatly contrary to the settled rule of statutory construction that "there is an inference that all omissions should be understood as exclusions." Sutherland's Statutory Construction § 47.23 at 123 (3d ed. 1973). Long ago the Supreme Court affirmed

^{17/} Pub. L. No. 94-233, 90 Stat. 219, March 15, 1976, to be codified as 18 U.S.C. §§ 4201-18.

^{18/} In United States v. Remling, 548 F.2d 1274 n.3 (6th Cir. 1977), the Sixth Circuit discussed Section 7 in the past tense, strongly suggesting that Section 7 has been repealed.

the principle that what is not spoken is not willed. Marbury v. Madison, 1 Cranch (5 U.S.) 137, 174-75 (1803).

The government apparently believes that Congress' failure to reenact Section 7 was a mere oversight -- an act without substantive significance. Relying upon Muniz v. Hoffman, 422 U.S. 454 (1975), the government argues that when Congress revises the law, it cannot be inferred that Congress intends to change settled policy. Brief for Cross-Appellant at 10.

"To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable. As this Court said in United States v. Rees, 110 U.S. 729, 740 (1884): 'It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed.'" 422 U.S. at 470.

Not only is Muniz inapposite, but it affirmatively supports Julie Busic's position that Congress did not inadvertently omit Section 7 from the new parole law. In Muniz, a labor union officer and his union argued that they had a statutory right to a jury trial under 18 U.S.C. § 3692 in connection with a criminal contempt proceeding for violating temporary injunctions of a federal court issued pursuant to the National Labor Relations Act. Section 3692 provides for a jury trial in contempt cases arising under any federal law governing the issuance of injunctions "in any case" growing out of a labor dispute. The

petitioners argued that Congress had changed the settled rule barring a jury trial in contempt actions arising out of Taft-Hartley injunctions when § 11 of the Norris-La Guardia Act was repealed and replaced with § 3692 as part of the 1948 revision of the Criminal Code. The Supreme Court rejected this contention.

The Supreme Court noted that prior to its repeal, § 11 of the Norris-La Guardia Act, which provided for jury trial in contempts arising out of labor disputes, had clearly not applied to injunctions authorized by the National Labor Relations Act. This was the explicit "congressional understanding" of the law as late as 1947 in passing the Taft-Hartley Act. 422 U.S. at 464. Therefore, the Supreme Court was unwilling to assume an "important change in the settled intention of Congress" because of the repeal of § 11 of Norris-La Guardia and the enactment of § 3692 in its place. 422 U.S. at 467. The Court also noted that the new statute could not be "read apart from other relevant provisions of the labor law" Id. at 468. The Court further explained that it was "construing a statute of Congress which, like its predecessor, created an exception to the historic rule that there was no right to a jury trial in contempt proceedings." Id. at 470.

The rationale for the decision in Muniz cuts against the government's position in the instant case. In its only statement on the question of the early parole eligibility of persons convicted of aircraft piracy and subject to a mandatory prison

tarm, Congress explicitly stated, in the legislative history of the federal aircraft piracy statute, that this federal parole provision was available to those defendants. See H.R. Rep. No. 958, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S. Code, Cong. & Admin. News 2563, 2568, discussed at pages 31-33 infra. Thus, at the time of repealing Section 7 and enacting the new parole law, it was the express "congressional understanding" that defendants convicted of aircraft piracy were eligible for early parole consideration. Muniz v. Hoffman, supra, 422 U.S. at 464. Moreover, since Congress believed that at least aircraft piracy defendants were not subject to the limitations of Section 7, the conclusion that Congress repealed Section 7 in 1976 does not effect any "important change in the settled intention of Congress . . ." as to this specific class of offenders. In addition, when the repeal of Section 7 is considered in the context of the plain language of the entire new parole law strongly suggesting that defendants with mandatory life sentences are eligible for early parole consideration, it becomes apparent that Congress deliberately repealed Section 7. Finally, since virtually all federal offenders were eligible for early parole prior to 1976, it is simply inaccurate to conclude, as the government does, that the repeal of "an exception to [this] historic rule" somehow works "a substantial change in accepted practice" Muniz v. Hoffman, supra, 422 U.S. at 470.

Muniz is inapposite for another important reason. In the instant case, we need not infer whether Congress intended to repeal Section 7. The government seems to be unaware that Section 7 was not merely omitted, but was replaced by subsection (h) of § 4205.^{19/} That provision provides:

"Nothing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for release under any other provision of law." 18 U.S.C. § 4205(h) (emphasis supplied).

The revised § 4205 clearly contains within it no prohibition against granting early parole eligibility to any class of offenders. Nor does subsection (h) withdraw the benefits of the early parole provision from those persons subject to mandatory sentences. When Congress wishes to bar a certain type of offenders from compassionate sentencing alternatives, it does so directly and in haec verba.^{20/} Subsection (h) of § 4205 simply

^{19/} The reason for the government's oversight may be that in both this Court and the District Court the government relied upon the Senate Report, S. Rep. No. 94-369, 94th Cong., 2d Sess. (1976). See Brief for Cross-Appellant at 10. Subsection (h) of Section 4205 was added after the Senate Report was written. See Conference Report, H.R. Rep. No. 94-838, 94th Cong., 2d Sess. 6 (1976).

^{20/} In Warden v. Marrero, 417 U.S. 653 (1974) the Supreme Court held that, in passing the Comprehensive Drug Prevention and Control Act of 1970 and that portion repealing former law making some types of narcotics offenders ineligible for

(Footnote continued)

provides that early parole eligibility shall be available to a defendant except when such eligibility has been specifically denied by another statute. The continued existence of Section 7, which bars parole eligibility for those serving mandatory sentences, in the same federal parole statute containing § 4205(h), which leaves all such determinations to other substantive statutes, would be totally inconsistent. Any such construction^{21/} would destroy the integrity of Section 4205 as now written.

(Footnote continued)

^{20/} parole, Congress had not intended to restore parole eligibility to certain other classes of narcotics offenders. Specifically, the Court ruled that, in repealing 26 U.S.C. 7237(d), Congress had intended by the general saving clause, (1 U.S.C. § 109) to make parole ineligibility in § 7237(d) a part of the punishment and therefore subject to the "penalty, forfeiture, or liability" terms of the saving clause. In so ruling, the Court stressed that "Congress expressly provided in § 7237(d) that parole under 18 U.S.C. § 4202 would be unavailable for narcotics offenders." 417 U.S. at 662 (emphasis added).

^{21/} The reason why the repeal and replacement of Section 7 received scant attention in the legislative history of the Parole Reform and Reorganization Act of 1976 may be attributable to Congress' understanding of federal parole law at the time it passed the new parole legislation. In Jones v. United States, 419 F.2d 593 (8th Cir. 1969), Justice (then Judge) Blackmun, speaking for the Eighth Circuit, had narrowly interpreted Section 7 such that it was considered essentially equivalent to new § 4205(h). Following Justice Blackmun's lead, the Ninth Circuit expressly held that Section 7 was not an obstacle to parole eligibility for a defendant convicted of aircraft piracy. See United States v. Ortiz, 488 F.2d 175 (9th Cir. 1973). Thus, it is not far-fetched to read new § 4205(h) as congressional approval of Jones and Ortiz. See pages 35-37, infra.

Even if there were some ambiguity about the repeal of Section 7, any doubt must be resolved in favor of the accused. See, e.g., Rewis v. United States, 401 U.S. 808, 812 (1971); Smith v. United States, 360 U.S. 1, 9 (1958); United States v. Bass, 404 U.S. 336, 347-349 (1971). This rule is particularly applicable in the context of parole eligibility. Parole is a creature of statute, and as such only Congress can confer its benefits on, or withhold them from, certain classes of offenders. In light of the strong congressional policy favoring parole, the courts should not infer a withholding of parole eligibility unless Congress has explicitly and unequivocally expressed its intention to bring about this result. This is particularly true in light of the serious adverse consequences flowing from a denial of parole eligibility.

"For the confined prisoner, parole -- even with its legal constraints -- is a long step toward regaining lost freedom. An observation made in a somewhat different context is apt:

'It may be "legislative grace" for Congress to provide for parole but when it expressly removes all hope of parole upon conviction and sentence for certain offenses, . . . this is in the nature of an additional penalty.' Durant v. United States, 410 F.2d 689, 691 (CA 5 1969). Warden v. Marrero, 417 U.S. 653, 663 (1974) (footnote omitted).

Accordingly, nothing in § 4205, Chapter 311, or any other provision of federal law prohibits those serving mandatory sentences from being granted early parole eligibility. The District Court correctly determined that Julie Busic was eligible

for parole consideration after eight instead of ten years.

C. Persons Convicted Under The Aircraft Piracy Statute May Be Granted Early Parole Eligibility

1. The Aircraft Piracy Statute Does Not Foreclose The Possibility Of Early Parole Consideration

When Congress wishes to remove a class of offenders from the coverage of the early parole provision, it does so unequivocally.^{22/} Therefore, under 18 U.S.C. § 4205(h), those convicted of aircraft piracy may be granted early parole eligibility unless the aircraft piracy statute explicitly provides otherwise. Since Congress did not even mention parole in the substantive aircraft piracy statute (49 U.S.C. § 1472(i)(1)),^{23/} we must conclude that Congress did not foreclose persons convicted under that statute from eligibility for early parole.

From the very first enactment of criminal penalties in 1961, federal aircraft piracy legislation has never contained any express provision making offenders ineligible for parole for any period of time.^{24/} Nor is there anything in the legislative

^{22/} See note 20, supra.

^{23/} See note 2, supra.

^{24/} The 1961 criminal provisions were contained in Pub. L. No. 87-197, 75 Stat. 466, Sept. 5, 1961. The 1974 amendments to the criminal penalties portion of the statute dealt with

(Footnote continued)

history of the statute to support this conclusion. Indeed, the legislative history of the 1961 criminal provisions explicitly emphasizes that all features of federal parole laws shall be available to persons convicted under the statute. The Report of the House Committee on Interstate and Foreign Commerce states:

"If the death penalty is not imposed, the punishment imposed by the court shall be imprisonment for not less than 20 years.

"Under other provisions of law contained in chapter 311 of Title 18 of the United States Code, relating to parole of Federal prisoners, an individual sentenced to imprisonment for life or for any term of years in excess of 45 becomes eligible for parole after serving 15 years of the sentence imposed. An individual sentenced to a lesser term of years becomes eligible for parole after serving one-third of the sentence imposed. The Federal courts are also given discretion, in the case of sentences to imprisonment for more than 1 year, to specify a minimum term of imprisonment after which a Federal prisoner may be eligible for parole. This minimum term may be less than one-third of the sentence imposed, but may not exceed one-third of such sentence.

(Footnote continued)

24/ the revisions necessary in the capital punishment procedures because of Furman v. Georgia, 408 U.S. 238 (1972). See H.R. Rep. No. 93-885, 93d Cong. 2d Sess. (1974), reprinted in 1974 U.S. Code, Cong. & Admin. News 3975, 3977-83; H.R. Rep. No. 93-1194, 93d Cong. 2d Sess. (1974), reprinted in 1974 U.S. Code, Cong. & Admin. News 3996, 3998-4000. Congress also altered the penalty scheme to provide for a life sentence if the court or jury decided against capital punishment for an air piracy resulting in death and to provide for a minimum 20-year sentence for air piracy. These penalty modifications, however, did not include the addition of any parole ineligibility provisions.

"In view of the discretion vested in the Federal courts in connection with the sentencing of individuals convicted of Federal crimes, under the various provisions of law relating to parole, probation, and young adult offenders, the committee is of the opinion that there is ample discretion vested in the courts to make the punishment fit the seriousness of the crime."
H.R. Rep. No. 958, 87th Cong., 1st Sess. (1961),
reprinted in 1961 U.S. Code, Cong. & Admin. News
2563, 2568 (emphasis added).

The government's response to this powerful, unambiguous expression of congressional intent is incredible. It argues that when the House committee report was written, the statute did not contain the penalty of life imprisonment. Brief for Cross-Appellant at 12. What the government conveniently ignores, however, is that the statute did contain both a death penalty and a mandatory minimum twenty-year sentence if death was not imposed. Thus, while the statute had no mandatory life sentence, a life sentence certainly could have been imposed. Indeed, the committee report explicitly refers to "imprisonment for life" in its discussion of parole.

Moreover, when the mandatory life sentence provision was added to the aircraft piracy statute in 1974,^{25/} there was absolutely no indication that Congress had altered its view that early parole eligibility was available. Indeed, the Ninth Circuit has expressly held that "the legislative history shows that Congress intended Section 4208 [now Section 4205(b)] to be applicable to

^{25/} See note 24, supra.

a sentence imposed for skyjacking." United States v. Ortiz, 488 F.2d 175, 179 (9th Cir. 1973). And only this year, the Sixth Circuit wholeheartedly endorsed Ortiz and held that early parole eligibility was available to persons convicted of aircraft piracy:

"The statute does not expressly prohibit early parole and, as pointed out by the Ninth Circuit in Ortiz, supra, at 179 n.1, the earlier version of the statute was conceived by the Congress to be subject to the early parole provisions. House Report No. 958, Aug. 16, 1961, reprinted in 1961 U.S. Code Cong. & Admin. News p. 2568. Our conclusion is fortified by the observation that the 1974 amendments to the penalty provisions, pursuant to which Remling was sentenced, were passed after Ortiz and no dissatisfaction with the Ninth Circuit's construction was expressed." United States v. Remling, 548 F.2d 1274, 1275 (6th Cir. 1977) (emphasis added).

In an argument bordering on arrogance, the government also suggests that Congress made a "mistake" when it provided for early parole eligibility for aircraft hijackers. "[I]t is apparent that the author of . . . House Report No. 985 [sic] was unaware of Section 7 of P. L. 85-752, which made it plain that the provisions of former Section 4208(a) were not available where a mandatory minimum sentence must be imposed." Brief for Cross-Appellant at 12-13. Not content with accusing Congress of being sloppy because it supposedly omitted Section 7 from the new parole law, the government now charges Congress with being ignorant. This type of argument -- in the face of two Circuit Court decisions holding that Congress knew exactly what it was saying in 1961 -- is the product of desperation. It is further

testimony to the sad fact that the government's appeal of Julie's sentence is unprincipled.

2. The Aircraft Piracy Statute Does Not Impose
 A "Mandatory" Sentence Under Former Section 7

Even if Section 7 had not been repealed and replaced by 18 U.S.C. § 4205(h), Judge Bartels was still correct in granting Julie early parole eligibility. Before Section 7 was repealed, several courts had construed it in a very restrictive manner. The dominant congressional policy favoring parole convinced these courts that Section 7, like new § 4205(h), did not preclude the granting of early parole eligibility except where it had been expressly denied by another statute.

In Jones v. United States, 419 F.2d 593 (8th Cir. 1969), Justice (then Judge) Blackmun, speaking for the Eighth Circuit, held that a statute did not provide a "mandatory" penalty -- as the term is employed in Section 7 -- unless it specifically denied a defendant all relief by way of suspension of sentence, probation, and parole. If any of these benefits were available, Justice Blackmun wrote, the trial judge had discretion to grant early parole eligibility.

"In summary: we hold that the term 'mandatory penalty' in § 7 of the 1958 Act means a sentence which must be served devoid of the benefits of suspension, probation, and parole. Illustrative of this are the narcotic offenses described in § 7237(d)." Id. at 599; see also United States v. Johnson, 350 F. Supp. 807 (D. Mo. 1972).

While Julie cannot be granted a suspended sentence or probation, she is automatically eligible for parole after 10 years under 18 U.S.C. § 4205(a). Her eligibility for parole under § 4205(a) therefore indicates that her life sentence is not "mandatory" -- as that term is used in Section 7 -- and that she is eligible for early parole consideration under § 4205(b).

Justice Blackmun's analysis has found complete acceptance as applied to aircraft piracy.^{26/} In the only two reported decisions on the question, the Ninth and Sixth Circuits have held that, for Section 7 purposes, the aircraft piracy statute does not prescribe "mandatory" penalties.^{27/} In United States v. Ortiz, 488 F.2d 175 (9th Cir. 1973), the Ninth Circuit vacated the sentence of a hijacker because the trial judge erroneously concluded that he lacked discretion to grant the defendant early parole eligibility:

^{26/} The government has cited a number of cases which seem to reject Justice Blackmun's analysis. E.g., United States v. Woods, 484 F.2d 127 (4th Cir. 1973); United States v. Kleinzahler, 306 F. Supp. 311 (E.D.N.Y. 1969). Brief for Cross-Appellant at 11, 14. In those cases, however, there was no legislative support for the proposition that the imposed penalties were not intended to deny the benefits of early parole eligibility. By contrast, in this case, there is an explicit congressional statement that early parole is to be available for persons convicted of aircraft piracy. The line of authority cited by the government has been expressly distinguished on this ground. See United States v. Remling, 548 F.2d 1274 (6th Cir. 1977), discussed infra at pages 37-38.

^{27/} Both decisions construed Section 7 prior to its repeal in 1976. See pages 23-30, supra.

"The trial judge rejected sentencing Chavez pursuant to the special parole provisions of 18 U.S.C. § 4208(a) [now 4205(b)], stating he did not believe it applied to the air piracy statute. We disagree. Since the parole provisions of Section 4208 are not applicable to any offense for which there is provided a mandatory penalty, 18 U.S.C.A. § 4208 (originally appears as Act of Aug. 25, 1958, Pub. L. No. 85-752, § 3, 72 Stat. 845), the determinative question is whether 49 U.S.C. § 1472 requires a mandatory penalty. We have found no case so holding.

"In Jones v. United States, 419 F.2d 593, 594 (8th Cir. 1969), Judge (now Mr. Justice) Blackmun articulated the same issue which now confronts us

"He concluded that a 'mandatory penalty [is] a sentence which must be served devoid of the benefits of suspension, probation, and parole. Illustrative of this are the sentences for the narcotic offenses'

* * *

"On the other hand, the skyjacking penalty contains no such prohibitions upon probation or parole. Moreover, we believe the legislative history shows that Congress intended section 4208 [now § 4205(b)] to be applicable to a sentence imposed for skyjacking.

"We conclude that 49 U.S.C. § 1472(i) (specifying the punishment for aircraft piracy) does not provide for a mandatory penalty and, therefore, the trial judge has the discretion to sentence pursuant to Section 4208." Id. at 178, 179 (emphasis added; footnotes omitted).

Seven months ago, the Sixth Circuit, relying on Ortiz, similarly reversed a trial judge who believed that he had no power to grant early parole eligibility to a hijacker. In United States v. Remling, 548 F.2d 1274 (6th Cir. 1977), the

Sixth Circuit held as follows:

"Although the district judge indicated his desire to make the sentence subject to early parole eligibility under the former 18 U.S.C. § 4208(a)(2) [reenacted in similar language as 18 U.S.C. § 4205(b)] , he concluded that he was without power to do so

* * *

"[W]e conclude that the legislative history of the anti-hijacking legislation leads to a different result from that in Hardaway [v. United States, 350 F.2d 1021 (6th Cir. 1965)], which involved the armed robbery of a post office under 18 U.S.C. § 2114. We thus align ourselves with the position of the Ninth Circuit in United States v. Ortiz, 488 F.2d 175 (9th Cir. 1973), which held that 49 U.S.C. § 1472(i) does not provide for a mandatory penalty, therefore allowing the trial judge the discretion to impose an indeterminate sentence under § 4208. The statute does not expressly prohibit early parole and, as pointed out by the Ninth Circuit in Ortiz, supra, at 179 n.1, the earlier version of the statute was conceived by the Congress to be subject to the early parole provisions. House Report No. 958, Aug. 16, 1961, reprinted in 1961 U.S. Code. Cong. & Admin. News p. 2568. Our conclusion is fortified by the observation that the 1974 amendments to the penalty provisions, pursuant to which Remling was sentenced, were passed after Ortiz and no dissatisfaction with the Ninth Circuit's construction was expressed." Id., at 1274, 1275 (emphasis added); see also note 24, supra.

In Ortiz and Remling -- the only two known decisions on this issue -- the government's position has been roundly repudiated. These decisions confirm that even if Section 7 had not been repealed, Judge Bartels was entirely correct in determining

that he had the discretion to make Julie eligible for early parole consideration.

III.

THE GOVERNMENT HAS NO RIGHT TO APPEAL
JULIE BUSIC'S SENTENCE AND THIS COURT
SHOULD REFUSE TO EXERCISE ITS DISCRETIONARY
JURISDICTION OVER THE MANDAMUS PETITION

In this case, the government chose to ignore the only appropriate procedural route for disputing a sentence -- mandamus -- and instead filed a direct appeal under 28 U.S.C. § 1291. Recognizing the problems with this course of action, the government then asked, in its brief, that its appeal also be treated as a petition for a writ of mandamus. Brief for Cross-Appellant at 15, 17. Under well-established authority and the circumstances of this case, neither remedy is available to the government.

A. The Government Cannot Appeal A Disputed
Sentence Under 28 U.S.C. § 1291

"It has long been established that the United States cannot appeal in a criminal case without express congressional authorization." United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977) (emphasis added); United States v. Wilson, 420 U.S. 332, 336 (1975). Moreover, "appeals by the government in criminal cases are something unusual, exceptional, [and] not favored." Carroll v. United States, 354 U.S. 394, 400 (1957). Therefore, statutes granting authority for such review have always been subject

to "the canon of strict construction," United States v. Jorn, 400 U.S. 470, 476 (1971), and a "clear statutory mandate must exist to found jurisdiction." Carroll v. United States, supra, 354 U.S. at 399.

The government claims a right to appeal Julie's sentence under the authority of 28 U.S.C. § 1291, which gives this Court jurisdiction over appeals from "all final decisions" of the District Courts.^{28/} The argument is plainly untenable. In light of the existence of the special Criminal Appeals Act (18 U.S.C. § 3731), the Supreme Court has found "very few" circumstances where § 1291 authorizes a criminal appeal. Carroll v. United States, supra, 354 U.S. at 403.^{29/} The Criminal Appeals Act delineates with particularity those instances where the

^{28/} The statute provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291.

^{29/} The government has not sought review under the Criminal Appeals Act. This Court has left open the issue of whether the government can appeal under 18 U.S.C. § 3731 the denial of its Rule 35 motion attacking an illegal sentence. See United States v. Jackson, 550 F.2d 830 (2d Cir. 1977). Nevertheless, an attempt to gain review under § 3731 should be unsuccessful since the statute carefully lists all those situations in which the government may appeal, and sentencing disputes are not mentioned.

government may appeal in a criminal case. It is only in these circumscribed situations that the government may take such an appeal, and sentencing challenges are not among them.^{30/}

The government is thus forced to argue that the imposition of Julie's sentence "may be found to possess sufficient independence from the main course of the prosecution . . . to be appealable on the authority of 28 U.S.C. § 1291 without regard to the limitations of 18 U.S.C. § 3731" Brief for Cross-Appellant at 16, quoting Carroll v. United States, supra, 354 U.S. at 403-04 (emphasis added). The government's attempt to characterize sentencing as "independent" from the prosecution is ludicrous. Indeed, such an attempt has been explicitly rejected by the Supreme Court.

"Bradley v. United States, 410 U.S. 605, 611 (1973) expressly reserved decision of the question now before us. Bradley involved the conviction and sentencing after May 1, 1971, of offenders who committed narcotics offenses before that date. We held that sentencing is part of the concept of prosecution'"

* * *

^{30/} Accordingly, the government's reliance on Abney v. United States, 431 U.S. 651, (1977), is entirely misplaced. Abney involved a criminal appeal by a defendant whose claim of double jeopardy had been denied. The Criminal Appeals Act does not apply to defendants and thus does not affect their appeal rights under 28 U.S.C. § 1291. Moreover, the historical policy against criminal appeals applies only to the government, not to the defendant.

"[W]e reasoned that, since a District Judge's decision to make an offender eligible for early parole is made at the time of entering a judgment of conviction, the decision [to grant or deny early parole] was part of the sentence and therefore also part of the 'prosecution'". Warden v. Marrero, supra, 417 U.S. at 656-58 (emphasis added).

From the perspective of the defendant, as well as the community, sentencing is an integral part of the prosecution. Indeed, in a criminal justice system so heavily dependent upon guilty pleas, sentencing is often the most important phase of the prosecution. Since sentencing is an integral part of a criminal prosecution, the government's rationale for permitting an appeal under § 1291 evaporates.

In the only reported decision on this question, the Ninth Circuit unequivocally ruled that a judge's power to impose sentence could not be the subject of a government appeal under 28 U.S.C. § 1291. In United States v. Lane, 284 F.2d 935 (9th Cir. 1960), the Ninth Circuit rejected the argument advanced by the government in this case and held

"that the attempted appeal from that part of the judgment which suspends the imposition of sentence and grants probation does not possess sufficient independence from the criminal proceeding to permit of a government appeal under 28 U.S.C.A. § 1291." 284 F.2d at 938.

The government's appeal of Julie Busic's sentence must be dismissed for lack of jurisdiction.

B. This Is Not A Proper Case For This Court To Exercise Its Discretionary Mandamus Jurisdiction

It is well-established that regardless of the merits of an issue, the granting of a writ of mandamus lies within the discretion of this Court. While judicial power to impose a particular sentence is a question for which mandamus may be appropriate, United States v. Jackson, supra, 550 F.2d at 831, this extraordinary writ should be used sparingly and certainly not whenever such a question arises. See e.g., United States v. Olds, 426 F.2d 562 (3d Cir. 1970); United States v. Carter, 270 F.2d 521 (9th Cir. 1959). Even the government has conceded that if there is "any policy reason for precluding an appeal . . . review by mandamus, which is discretionary, would not be available." Brief for Cross-Appellant at 17.

The traditional rule that a writ should issue only in "extraordinary situations" applies with full force in this case. Kerr v. United States District Court, 426 U.S. 394, 402 (1976); United States v. Olds, supra, 426 F.2d at 565.

"The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power will justify the invocation of this extraordinary remedy.

* * *

"[T]he most that can be claimed on this record is that [the trial judge] may have erred in ruling on matters within his jurisdiction. But '[t]he extraordinary writs do not reach to such cases'" Will v. United States, 389 U.S. 90, 95, 103-04 (1967), cited with approval in Kerr v. United States District Court, supra, 420 U.S. at 402 (citations omitted).

Moreover, the writ of mandamus is governed by equitable principles and will not be issued where a petitioner does not come to this Court with "clean hands". As Mr. Justice Brandeis wrote for the Supreme Court:

"Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles." Duncan Townsite Co. v. Lane, 245 U.S. 308, 311-12, (1917) quoted in United States v. Olds, supra, 426 F.2d at 565; accord United States v. United States District Court, Central District of California, 509 F.2d 1352 (9th Cir. 1975).

The circumstances surrounding the ruling at issue here strongly militate against the issuance of a writ of mandamus. As we have demonstrated, the government has been duplicitous in its dealings with this Court and the District Court. See pages 13-17, supra. It has argued one position, and then, to suit its own convenience, advanced the opposite. This Court should neither condone nor encourage such conduct. To grant the extraordinary writ -- when the petitioner does not enter the Court

with "clean hands" -- would dishonor the equitable principles traditionally governing mandamus.

Mandamus should be denied for another important reason. Judge Bartels' decision that Julie is eligible for early parole consideration was not clearly erroneous and was hardly a "usurpation of power". The trial judge faced and resolved difficult problems involving the repeal of Section 7 and early parole eligibility under the aircraft piracy statute. The question of whether Section 7 had been repealed was a matter of first impression. While the government might believe that Judge Bartels erred, it has not met its "burden of showing that its right to issuance of the writ is 'clear and indisputable.'" Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953); Will v. United States, *supra*, 389 U.S. at 96; Kerr v. United States District Court, *supra*, 426 U.S. at 403. Whatever may be said of the trial court's ruling on the merits, this is not one of the "'really extraordinary causes'" for which this extraordinary remedy is reserved. Will v. United States, *supra*, 389 U.S. at 107, quoting Ex Parte Fahey, 332 U.S. 258, 260 (1947).

Since the repeal of Section 7 is a novel legal question, the proper course for this Court is to allow the District Courts an opportunity to address the problem. This Court should not exercise its discretionary authority until its judgment can be informed by lower court decisions or until the District Courts in this Circuit have evidenced an inability to achieve uniform

results. At the present time, however, it is inappropriate and unnecessary for this Court to issue an extraordinary writ.

The government's petition for a writ of mandamus should be dismissed.

CONCLUSION

The most important question here is whether this Court should condone duplicitous conduct on the part of the government. By reaching the merits of the government's argument, this Court would encourage prosecutors to abandon a principled approach to litigation. Victory at any price, rather than justice at all times, must never be allowed to become the unspoken code of conduct for government counsel in criminal prosecutions. This Court should refuse to consider the government's request for relief.

The District Court's decision is obviously correct. As a modern civilized society, we have come to cherish our dedication to individualized justice and the goal of rehabilitation. Nowhere is the affirmation of this commitment more evident than in the parole provisions of 18 U.S.C. § 4205. And nowhere is the proper effectuation of these provisions more evident than in Judge Bartels' well-reasoned, balanced decision to grant early parole eligibility to Julie Busic.

To disturb this sound use of judicial discretion, the government has resorted to a contorted reading of the early parole provision and an even more tortured interpretation of its legislative history. The plain language of the early parole provision

and the aircraft piracy statute demonstrates that Judge Bartels' exercise of his sentencing discretion was completely justified. Moreover, the statutory provision upon which the government bases its main argument to the contrary has been repealed. In light of the strong congressional policy favoring parole, there is simply no reason for this Court to engage in the intellectual gymnastics urged by the government.

Finally, the issue raised by the government is not properly before this Court. The government has no statutory authority to appeal a disputed sentence. In light of the government's duplicitous conduct in reversing its legal position in this Court and the absence of any compelling or extraordinary circumstances, this Court should not issue the highly discretionary writ of mandamus.

For the foregoing reasons, the government's appeal and petition for writ of mandamus should be dismissed.

Respectfully submitted,

MICHAEL E. TIGAR
PIERCE O'DONNELL

1000 Hill Building
Washington, D.C. 20006
(202) 331-5000

Attorneys for Cross-Appellee
Julienne Busic

Of Counsel:

WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D.C. 20006
(202) 331-5000

Dated: November 11, 1977

A P P E N D I X

APPENDIX A

Relevant Federal Parole Provisions -- Prior to
Passage of the Parole Commission and Reorganization
Act of 1976

TITLE 18, UNITED STATES CODE

§ 4202. Prisoners eligible

A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years. (June 25, 1948, 62 Stat. 854, July 31, 1951, 65 Stat. 150).

§ 4208. Fixing eligibility for parole at time of
sentencing

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the

APPENDIX A
Page Two

case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section. (Pub. L. 85-752, Aug. 25, 1958, 72 Stat. 845).

UNCODIFIED

Section 7 of Pub. L. 85-752 provided that: "This Act does not apply to any offense for which there is provided a mandatory penalty."

APPENDIX B

Relevant Federal Parole Provisions -- After
Passage of the Parole Commission and Reorga-
nization Act of 1976

TITLE 18, UNITED STATES CODE

§ 4205. Time of eligibility for release on parole

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

(c) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (d) of this section. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) place the offender on probation as authorized by section 3651; or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from the date of original commitment under this section.

APPENDIX B
Page Two

(d) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsections (a) or (b) of this section, the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the Commission a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The Commission may make such other investigation as it may deem necessary.

(e) Upon request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency, concerning any eligible prisoner or parolee and whenever not incompatible with the public interest, their views and recommendation with respect to any matter within the jurisdiction of the Commission.

(f) Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole to the authorities of any State otherwise entitled to his custody.

(g) At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.

APPENDIX B
Page Three

(h) Nothing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for such release under any other provision of law. (Pub. L. 94-233, Mar. 15, 1976, 90 Stat. 222.)

APPENDIX C

TRP:PRS:ma
F. # 763,251

March 4, 1977

Nancy Rosner, Esq.
401 Broadway
New York, New York 10013

Re: United States v. Mark Vlasic
Docket No. 76 CR 602

Dear Ms. Rosner:

The following constitutes the complete agreement concerning the disposition of the case of United States v. Mark Vlasic, 76 CR 602:

(1) The defendant, Mark Vlasic will plead guilty to Count Two of indictment number 76 CR 602. Counts one and three of said indictment will be dismissed at the time the defendant is sentenced.

(2) The government and the defendant agree that a sentence in excess of thirty years should not be imposed in this case. This agreement is made in accordance with Rule 11 (e) (1) (2), Federal Rules of Criminal Procedure.

(3) It is understood that the United States Attorney's Office will recommend to the Bureau of Prisons that after the expiration of six years from the date of sentence the defendant should be transferred to a minimum security institution to serve the remainder of his sentence. It is further understood that this recommendation is not binding on the Bureau of Prisons and will be effective only if the Bureau of Prisons concurs at that time. It is further understood, nevertheless, that this recommendation will be granted due and serious consideration.

March 4, 1977

(4) This sentence is to be served in a federal prison.

(5) The government will make no recommendation concerning what the actual sentence imposed by the court should be other than as set forth in paragraph (2) above. The government does recommend, however, that the sentence be imposed pursuant to Title 18, U.S.C., Section 4205(b)(2).

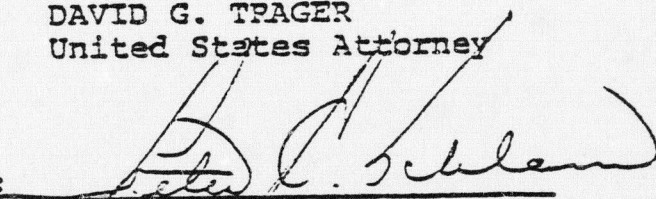
(6) The government will not compel the defendant to be a witness at the trial of the case of United States v. Basic, et al., 76 CR 602.

It is understood that the above constitutes the complete agreement between the defendant and the government and that no other promises, expressed or implied, have been made to him. It is further understood that the defendant relies on the entire agreement in entering his plea of guilty.

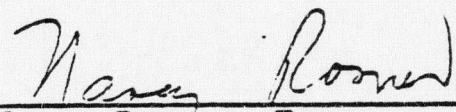
If the above is in accord with your understanding and that of the defendant, Mark Vlasic, we request that you and the defendant, Mark Vlasic, sign this letter below.

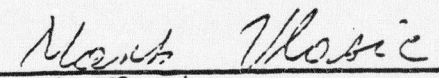
Very truly yours,

DAVID G. TRAGER
United States Attorney

By: 

Peter R. Schlam
Assistant U.S. Attorney


Nancy Rosner, Esq.


Mark Vlasic

APPENDIX D

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

UNITED STATES ATTORNEY

EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

DGT:rb

July 20, 1977

Honorable John R. Bartels
United States District Judge
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Vlasic
Docket No. 76 CR 602

Dear Judge Bartels:

My attention has been called to paragraph 5 of the plea agreement between the United States and the defendant Marc Vlasic, which provides: "The government does recommend, however, that the sentence be imposed pursuant to Title 18, U.S.C., Section 4205(b)(2)."

Quite frankly, at the time the agreement was signed, we were not aware of the legal impediment to the imposition of such a sentence created by Section 7 of P.L. 85-752. Nevertheless, since there is authority to sustain the propriety of early parole eligibility, at least where there is not a mandatory life sentence, we will not challenge such a sentence if it is imposed on Mr. Vlasic.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

By: EDWARD R. KORMAN
Chief Assistant
United States Attorney

cc: Jeffrey Weisenfeld, Esq.

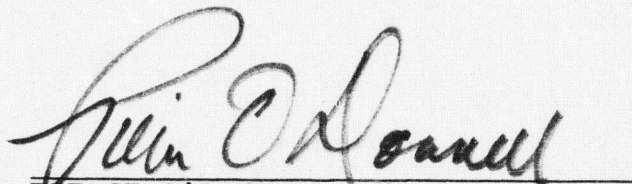
CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF FOR
CROSS-APPELLEE JULIENNE BUSIC was served by depositing copies
in the United States Mails at Washington, D. C., first class
postage prepaid, this 11th day of November, 1977, addressed
to the following:

Hon. Edward R. Korman
Chief Assistant United States Attorney
Eastern District of New York
Federal Building
225 Cadman Plaza East
Brooklyn, New York 11201

Hon. John R. Bartels
United States District Court for
the Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Paul B. Bergman, Esq.
Ford Marrin Esposito Witmeyer & Bergman
Cunard Building
25 Broadway
New York, New York 10004


PIERCE O'DONNELL

